No. 78-714

In the Supreme Court of the United States

OCTOBER TERM, 1978

CLARENCE WELCH, ADMINISTRATOR OF THE ESTATE OF DAVID R. WELCH, PETITIONER

v.

W. GRAHAM CLAYTOR, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner's decedent, a sailor stationed in Italy on active duty with the Navy, was fatally injured by a naval vehicle driven by a member of the Navy. The accident occured on the naval air facility base while decedent was walking to work (Pet. App. 3).

Petitioner's claim for damages for wrongful death was denied by the Secretary of the Navy, who found that the fatal accident was "incident to service" and that recovery was barred by Section 2733(b)(3) of the Military Claims Act (MCA), 10 U.S.C. 2731 *et seq.*[1] The Secretary also

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[1]The MCA authorizes the Secretary of the Navy to settle certain claims for property loss, injury, and death resulting from non-combatant military operations. Section 2733(b)(3) of the Act excludes claims for personal injury or death of a member of the military "whose injury or death is incident to his service."

concluded that petitioner's claim under the Federal Tort Claims Act (FTCA) was barred by the "foreign country" exception, 28 U.S.C. 2680(k), and by the "incident to service" exception defined in *Feres* v. *United States*, 340 U.S. 135 (1950).

The district court upheld the Secretary's determination, concluding that neither Act provides a remedy for petitioner. The court pointed out that the FTCA is inapplicable because petitioner's claim arose in a "foreign country" (Pet. App. 4) and that the MCA is inapplicable because the injury was "incident to service" (Pet. App. 11-12). In interpreting the MCA's "incident to service" exception, the court followed *Feres* and its progeny, including *Camassar* v. *United States*, 400 F. Supp. 894 (D.Conn. 1975), affirmed, 531 F. 2d 1149 (2d Cir. 1976), which establish that an injury to a member of the armed forces on active duty, which occurs on a military base, is an injury incident to military service. The court of appeals affirmed (Pet. App. 14-15).

Petitioner contends that the dismissal of his claim under the MCA was improper. Although there is no material difference between the MCA and FTCA "incident to service" exceptions,[2] petitioner contends that the court below erred in relying on *Feres* and its progeny in construing the MCA because different policies underlie the two Acts. He contends that the MCA creates a broad administrative remedy for persons injured by military activities and therefore the "incident to service" exception in the MCA should be construed more narrowly than its counterpart in the FTCA (Pet. 11-12, 24-25).

[2]The MCA excludes claims of a member of the military whose injury or death is incident to his service, while, under *Feres*, *supra*, 340 U.S. at 146, the FTCA excludes claims that "arise out of or are in the course of activity incident to service."

But the purpose of Congress in enacting the MCA was to compensate members of the public for injuries caused by military operations, not members of the military for service connected injuries. See S. Rep. No. 2216, 85th Cong., 2d Sess. 1-6 (1958). Thus, the lower court's interpretation of the "incident to service" exception to exclude decedent's claim is entirely consistent with the policies of the Act.

This Court's decision in *Feres* provides direct support for the decision here. In *Feres*, which involved an active-duty serviceman injured on base by the negligence of other servicemen, this Court pointed out that "[n]o federal law recognizes a recovery such as claimants seek. The Military Personnel Claims Act, 31 U.S.C. §223b * * * permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service' " (340 U.S. at 144). The claim in *Feres*, substantially similar to petitioner's claim, was thus recognized as being incident to the decedent's service within the meaning of the Military Personnel Claims Act, the precursor of the current statute.[3]

Even assuming *arguendo* that the courts below erred in relying on decisions construing the FTCA, we submit that decedent's death was "incident" to his service under any reasonable interpretation of the MCA exception. At the time of the accident, decedent was on active duty. His presence at the naval air facility was pursuant to military assignment and he was reporting for morning duty subject to specific military orders. Reporting for duty on the military base was clearly incident to his service obligations. Cf. *O'Keeffe* v. *Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965). Because military service

[3]The sole issue in *Feres* was whether the FTCA excludes injuries incident to service (340 U.S. at 138). This Court's recent decision in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 670-674 (1977), reaffirms the *Feres* principle.

had more than a remote or fortuitous connection with the accident, *Brooks* v. *United States*, 337 U.S. 49 (1949), is inapposite. The serviceman in *Brooks* was injured in a private vehicle while on leave, far from the military installation, and in pursuit of personal activities. The decedent in this case, in contrast, was injured by a military vehicle on base while he was attemping to discharge his service obligations.

As the Court pointed out in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671, 673 (1977), the Veterans' Benefits Act, 38 U.S.C. 321 *et seq.*, establishes a statutory "no fault" compensation scheme that provides benefits for the surviving spouse, children and parents of servicemen killed in active military service without proof of negligence by the government.[4] Congress provided death benefits for members of the military killed in service connected accidents under that statute, not the Military Claims Act. There is thus a specifically prescribed remedy for the estate in this case and no warrant for expanding the MCA beyond the legislative intent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

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[4]Additional death benefits are prescribed under 10 U.S.C. 1475 *et seq.*

DOJ-1978-12